

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROBERT MCMINN)	
Claimant)	
VS.)	
)	Docket No. 253,875
SEDGWICK COUNTY)	
Respondent,)	
Self-Insured)	

ORDER

Both parties appealed the July 2, 2002 Award and the July 8, 2002 Nunc Pro Tunc Award Order entered by Administrative Law Judge John D. Clark. The Board heard oral argument on December 20, 2002, in Wichita, Kansas. Gary M. Peterson of Topeka, Kansas, was appointed as Board Member Pro Tem and participated in this appeal.

APPEARANCES

Dale V. Slape of Wichita, Kansas, appeared for claimant. E. L. Lee Kinch of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award and Nunc Pro Tunc Award Order.

ISSUES

This claim began as one for a February 14, 2000 accident and resulting injury to the right elbow. And on January 22, 2001, the parties entered into an agreed award in which claimant received permanent disability benefits for a 12.5 percent functional impairment to the right upper extremity.

But on March 5, 2001, claimant filed a request to review and modify the Agreed to Award. Claimant now alleges he aggravated and injured his left elbow by protecting his painful right arm. In the July 2, 2002 Award and July 8, 2002 Nunc Pro Tunc Award Order, Judge Clark determined that claimant's left upper extremity injury was the direct and natural result of the right upper extremity injury. Accordingly, the Judge modified the

agreed award and granted claimant benefits for an 11.5 percent permanent partial general disability commencing March 5, 2001.

Claimant contends Judge Clark erred. Claimant does not dispute that he now has an 11.5 percent whole body functional impairment, but claimant does dispute the Judge's finding and conclusion that he voluntarily quit his job with respondent and he is, consequently, precluded from receiving a work disability (a permanent partial general disability greater than the functional impairment rating). Claimant argues that he has a 57 percent task loss and a 100 percent wage loss for a 78.5 percent work disability.

Conversely, respondent argues Judge Clark erred by finding that claimant's left upper extremity injury was a direct and natural consequence of the right upper extremity injury. But, in the event the Board should determine that claimant is entitled to receive compensation for the left upper extremity, respondent argues that claimant is not entitled to receive a work disability as he voluntarily quit his job with respondent and, in addition, has failed to make a good faith effort to find another job. Respondent contends that any additional award of permanent disability benefits should be limited to a three percent permanent partial disability to the left upper extremity.

The only issues before the Board on this appeal are:

1. Did claimant injure his left upper extremity as a direct and natural result of the February 2000 injury to his right upper extremity?
2. If so, what is the nature and extent of claimant's disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

The parties do not dispute that claimant injured his right elbow on February 14, 2000, when he struck his elbow on the handrail of a staircase. The parties also do not dispute that claimant's accident arose out of and in the course of employment with respondent. Consequently, in January 2001, the parties entered into an agreed award in which claimant received benefits for a 12.5 percent permanent partial disability to the right upper extremity. The principal dispute in this claim is whether claimant subsequently injured his left upper extremity by overusing it protecting the right upper extremity.

Claimant began working for respondent in September 1999 on its jail detention maintenance crew. In that job claimant performed light maintenance, which included unclogging toilets; changing light bulbs, ballasts and fixtures; changing air filters in the

ceiling; repairing cell locks; repairing and maintaining the facility's heavier equipment such as pumps, boilers and air conditioners; and performing miscellaneous light maintenance tasks.

Following the February 2000 accident and right elbow injury, claimant continued working for respondent through March 3, 2000, when he terminated his employment and left work. According to claimant, he quit his job as he was unable to perform his job duties and he believed the building superintendent, Loyd Gilbreath, had advised him to find another job. Claimant testified, in part:

Q. (Mr. Kinch) Now, sir, describe for me the event leading to your termination at Sedgwick County [respondent].

A. (Claimant) That would be Lloyd [*sic*] Gilbreath. I complained to him several times that I couldn't do it over there --

Q. You couldn't do what?

A. My job over there in the jail, the detention center, cleaning the toilets and stuff. And after about the third or fourth time I brought it to his attention he just looked me in the eye and told me if I couldn't do my job I would be better off to go somewhere else and find employment. So I tried.

Q. So you did what?

A. So I tried.

Q. You tried what?

A. To find employment somewhere else.¹

Mr. Gilbreath did not testify to rebut that testimony. But respondent presented the testimony of Dennis Stuck, who was respondent's assistant building superintendent in March 2000 and who spoke with claimant when he terminated his job. Mr. Stuck testified that claimant advised he was quitting because he believed he would be fired due to his absenteeism from being ill. Mr. Stuck testified:

Q. (Mr. Kinch) Can you describe for us the events leading up to your conference with him [claimant] and the circumstances surrounding it?

¹ McMinn Depo. at 63.

....

A. (Dennis Stuck) . . . And Robert [claimant] was standing there by the secretary's desk and asked to speak to me. And he wanted to speak in private. And at that point I was told Lloyd [sic] was out of the building. So I told him to step into Lloyd's [sic] office and we would talk. And he asked that I close the door. And at that point he told me he was quitting, which came as a shock. I asked him why. He said that he was quitting because he feared Lloyd [sic] was going to fire him because he was sick too much. And I told him Lloyd [sic] had never mentioned to me once about termination or anything. He had mentioned to me on occasion about Robert's use of sick leave and was concerned about what was the problem, as all of us were. Because he started out as a very good employee. There constantly, every day, would work overtime. . . . And then all of a sudden, and I don't know when, he started using sick leave, missing sick days and stuff like that. And I tried to find out, you know, what was wrong, why he thought Lloyd [sic] was going to fire him. And he again said that it was due to use of sick leave, that he wasn't feeling too good. And I asked him what was wrong. And he said he had an ailment. And I don't recall, it was an internal ailment, gallbladder or kidney stone or something that was bothering him at the time. And he just felt that Lloyd [sic] was going to fire him over it. I asked him to stay a little bit longer until I could find out where Lloyd [sic] was at and try to get ahold [sic] of him and get him back. But Robert refused to. He left.²

Mr. Stuck testified after claimant. Therefore, claimant was not asked at either his September 2001 deposition or the October 2001 review and modification hearing whether he agreed with Mr. Stuck's rendition of the facts.

Before the above conversation occurred, Mr. Stuck had spoken to claimant on a couple of occasions about his absences, which began well before the February 2000 accident, and whether there was something that could be addressed in one of the respondent's employee assistance programs. But on those occasions, claimant indicated there was nothing wrong other than his ill health.

Shortly after terminating his employment with respondent, claimant worked approximately three days for a painting company before he was fired for not being able to do the job. Later, in April 2000, claimant worked for a second painting company for approximately one day before he was terminated. As of October 2001, when claimant last testified in this claim, claimant has not worked since leaving respondent's employment for any employer other than the two painting companies. In 2000, claimant did apply for both unemployment benefits, which were denied, and Social Security disability benefits. When

² Stuck Depo. at 10-12.

claimant testified in September 2001, the claim for Social Security disability benefits was pending.

Immediately after the February 2000 accident, claimant began receiving medical treatment for his right elbow at a minor emergency center, where he was treated through March 8, 2000. Claimant next began treating with orthopedic surgeon Dr. Robert L. Eyster, who first saw claimant on March 15, 2000, and who diagnosed right lateral epicondylitis. After an injection and physical therapy failed to resolve claimant's symptoms, on June 26, 2000, Dr. Eyster performed a lateral epicondyle release on claimant's right elbow. Dr. Eyster treated claimant through September 20, 2000, when the doctor concluded that claimant could return to his regular duties as tolerated. The doctor rated claimant as having a 10 percent functional impairment to the right upper extremity under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment (AMA Guides)* and released claimant from medical care without restrictions.

In early December 2000, Dr. Pedro A. Murati evaluated claimant's right upper extremity at his attorney's request the first of two times. As a result of the December 2000 examination, Dr. Murati diagnosed (1) right elbow pain status post right lateral epicondyle release and (2) probable right radian nerve entrapment at the right elbow. The doctor did not place medical restrictions on claimant but advised him to work as tolerated. Further, in December 2000, Dr. Murati determined that claimant had sustained a 15 percent functional impairment to the right upper extremity under the *AMA Guides*.

As mentioned above, in January 2001 the parties entered into an agreed award in which claimant received benefits for the right upper extremity injury. According to claimant, his left elbow symptoms worsened after the agreed award was entered, which prompted him to request a change in that award.

Claimant contends that he had left upper extremity complaints that began within a couple of weeks following the February 14, 2000 right upper extremity injury. But neither Dr. Eyster's records that were compiled through September 2000 nor Dr. Murati's December 2000 report mention such complaints. Moreover, the parties did not address the left upper extremity in the January 22, 2001 Agreed to Award.

Nonetheless, according to the medical history claimant ultimately provided to Dr. Murati, claimant advised Dr. Eyster of having left upper extremity symptoms before the September 2000 release from treatment but Dr. Eyster advised, however, that he was only authorized to treat the right arm. Claimant also testified that before the September 2000 release he complained about his left elbow to his physical therapist. Neither the therapist's testimony nor the therapist's records are in evidence.

On March 5, 2001, claimant filed an application to review and modify the agreed award and an application to request medical treatment for his left upper extremity.

Responding to the request for additional medical treatment, respondent again authorized claimant to see Dr. Eyster. Claimant returned to Dr. Eyster on March 26, 2001, and was prescribed more physical therapy. On April 13, 2001, after claimant declined the doctor's offer of left elbow surgery, Dr. Eyster released claimant from treatment and rated claimant's left upper extremity condition as comprising a three percent functional impairment to that extremity, which, when combined with the right upper extremity impairment, created a six percent whole body functional impairment.

After declining left elbow surgery, claimant returned to Dr. Murati for further evaluation. The doctor saw claimant in June 2001 and diagnosed (1) left radial nerve entrapment at the elbow secondary to overuse syndrome and (2) left epicondylitis. Dr. Murati rated the functional impairment in claimant's left upper extremity at 13 percent, which, when combined with the 15 percent functional impairment in the right upper extremity, created a 16 percent whole body functional impairment. Additionally, the doctor determined that claimant should be restricted from (1) heavy grasping with either hand; (2) lifting, pushing or pulling more than 35 pounds occasionally and no more than 20 pounds frequently; (3) using hooks and knives; (4) using vibratory tools; and (5) repetitive grasping and grabbing and frequently using hand controls.

In November 2001, Dr. C. Reiff Brown examined claimant at respondent's request. The doctor diagnosed severe bilateral epicondylitis, which he rated as comprising a 14 percent functional impairment to the right upper extremity and a seven percent impairment to the left upper extremity, which combined for a 12 percent whole body functional impairment. The doctor concluded that claimant should avoid work that required frequent supination of the hand and forearm, avoid lifting with the hands pronated and avoid frequent dorsiflexion of the wrists greater than 30 degrees.

In February 2002, at claimant's attorney's request Dr. Frederick R. Smith examined claimant for purposes of this claim. Dr. Smith rated the functional impairment in claimant's right upper extremity at 15 percent and rated the functional impairment in the left upper extremity at 15 percent also, which combined for a 17 percent whole body functional impairment under the *AMA Guides*. Dr. Smith also believed that claimant should observe permanent work restrictions. In his February 20, 2002 medical report, Dr. Smith concluded:

In regard to work restrictions, I am going to pretty much go along with Dr. Brown that he should limit any kind of lifting with the upper extremities, firm grasping, twisting, frequent use of the hands as far as flexion/extension of the wrist,

flexion/extension of the elbows and supination/pronation of the wrists and forearms.³

1. Did claimant injure his left upper extremity as a direct and natural result of the February 2000 injury to his right upper extremity?

The record contains several expert medical opinions that address whether claimant injured his left arm as a direct and natural consequence of the right arm injury. First, Dr. Murati determined that claimant's left arm injury occurred as the result of an overuse syndrome that was the direct and natural result of the right arm injury. In short, Dr. Murati believes claimant injured his left arm by using it more because his right arm was injured.

Assuming claimant's left upper extremity symptoms developed after he had left respondent's employment and when claimant was not working, Dr. Brown opined that he did not believe claimant would have been protecting his right arm to such a degree that he would have overused the left upper extremity, causing the left elbow epicondylitis. But the doctor could not provide any other explanation for the left elbow injury.

Conversely, Dr. Smith concluded that claimant's left elbow injury occurred because claimant was protecting the injured right arm. The doctor testified, in part:

I believe the simplest way to describe, because he was protecting the right side, he, therefore, had to use the left side for most of his activities or overuse it, one might say, and therefore developed the symptoms of epicondylitis on the left side.⁴

According to Dr. Smith, claimant had advised that some of the activities that he did at home were yard work, including mowing, raking and bagging leaves; laundry, including washing, folding and ironing clothes; vacuuming; washing dishes and cleaning bathrooms.

And finally, Dr. Eyster concluded that claimant's left upper extremity injury was not related to claimant's February 14, 2000 accident primarily because claimant's left arm symptoms did not arise while claimant was working for respondent. The doctor testified:

I expressed that I didn't think the left elbow epicondylitis in all likelihood was related to the work injury itself. I felt that the only relationship that could be made was because the pain he was having with the right would result in overuse of the left

³ As noted above, Dr. Smith states in his report that he agrees with Dr. Brown's restrictions. But at his deposition, Dr. Smith testified that he agreed with Dr. Murati's task loss opinion. The parties did not clarify this apparent discrepancy.

⁴ Smith Depo. at 8.

arm. But since I knew at least the history I had was he hadn't from the time I had been treating him when he wasn't making any complaints actually with the left arm and he hadn't really been at work, that the overuse would have been not at the original place of employment and would have been on his own activities at most; and, therefore, if I were to be really questioned rigorously about whether it is work related, it wasn't.⁵

Dr. Eyster denies that claimant ever complained to him of left elbow symptoms while he was treating claimant's right elbow. Nonetheless, the doctor testified that he often sees patients who overuse the extremity opposite to the injured limb and, moreover, that the most common cause of epicondylitis is overuse. Although Dr. Eyster would not agree that claimant more probably than not injured the left elbow by protecting the injured right arm, the doctor had no reason to disbelieve claimant's assertion that he did. Further, the doctor had no other history or information that claimant had injured his left upper extremity in any manner other than by overusing the left arm due to the right arm injury.

The Board affirms the Judge's finding and conclusion that claimant's left upper extremity injury was the direct and natural result of the right upper extremity injury. Consequently, claimant is entitled to receive workers compensation benefits for the left arm.

2. What is the nature and extent of claimant's injury and disability?

The Board affirms the Judge's finding that as a direct and natural consequence of the February 14, 2000 accident claimant sustained an 11.5 percent whole body functional impairment.

The Board also affirms the Judge's conclusion that claimant's permanent partial general disability should be limited to that whole body functional impairment rating.

When an injury does not fit within the schedules of K.S.A. 1999 Supp. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 1999 Supp. 44-510e, which provides, in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any**

⁵ Eyster Depo. at 13.

substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*⁶ and *Copeland*.⁷ In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

If a finding is made that a good faith effort has not been made, the factfinder [*sic*] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .⁸

This Board has also held that workers are required to make a good faith effort to retain their post-injury employment. Consequently, permanent partial general disability benefits are limited to the worker's functional impairment when, without justification, a worker voluntarily terminates a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage.

⁶ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

⁷ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

⁸ *Id.* at 320.

On the other hand, employers must also demonstrate good faith. In providing accommodated employment to a worker, *Foulk* is not applicable where the accommodated job is not genuine,⁹ where the accommodated job violates the worker's medical restrictions,¹⁰ or where the worker is fired after making a good faith attempt to perform the work but experiences increased symptoms.¹¹

The good faith of a worker's efforts to find or retain appropriate employment is determined on a case-by-case basis. The Board concludes that claimant has failed to prove that he made a good faith effort to retain his employment with respondent. Before the February 2000 accident, claimant began missing work due to his ill health. Claimant, accordingly, was fearful that he was going to be fired due to his attendance problems. Despite being asked to postpone his resignation until claimant's immediate supervisor could be consulted, claimant walked off his job. When considering the nature of claimant's job with respondent, which was in the nature of light maintenance work, the Board concludes that claimant has failed to prove that he was justified in resigning his employment. Consequently, the wages that claimant was earning while working for respondent should be imputed for purposes of the wage loss prong of the permanent partial general disability formula. Accordingly, for purposes of the Workers Compensation Act claimant has failed to prove that he suffered a wage loss due to the February 14, 2000 accident.

Under these facts, claimant's agreed award should be modified to increase his permanent partial disability to an 11.5 percent permanent partial general disability, which is based upon claimant's functional impairment rating. Claimant's request for a work disability is denied.

AWARD

WHEREFORE, the Board affirms the July 2, 2002 Award as corrected by the July 8, 2002 Nunc Pro Tunc Award Order and modifies the January 22, 2001 Agreed to Award to grant claimant benefits for an 11.5 percent permanent partial general disability, commencing March 5, 2001.

Robert McMinn is granted compensation from Sedgwick County for a February 14, 2000 accident and resulting disability. Based upon an average weekly wage of \$554.30,

⁹ *Tharp v. Eaton Corp.*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

¹⁰ *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

¹¹ *Guerrero v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

Mr. McMinn is entitled to receive 14.43 weeks of temporary total disability benefits at \$369.55 per week, or \$5,332.61.

For the period ending March 4, 2001, Mr. McMinn had a 12.5 percent permanent partial disability to the right upper extremity and, therefore, is entitled to receive 24.45 weeks of permanent partial disability benefits at \$369.55 per week, totaling \$9,035.50 for that scheduled injury under K.S.A. 1999 Supp. 44-510d.

Commencing March 5, 2001, Mr. McMinn is entitled to receive permanent partial general disability benefits for an 11.5 percent whole body functional impairment, which equates to 47.73 weeks at \$369.55 per week, less the 24.45 weeks that were due and owing for the scheduled injury as determined in the paragraph above, leaving 23.28 weeks payable at \$369.55 per week, totaling \$8,603.12.

The total award is \$22,971.23, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the July 2, 2002 Award and the July 8, 2002 Nunc Pro Tunc Award Order to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of July 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Dale V. Slape, Attorney for Claimant
- E. L. Lee Kinch, Attorney for Respondent
- John D. Clark, Administrative Law Judge
- Paula S. Greathouse, Workers Compensation Director